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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEB 14 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

In the Matter of:)	
)	
Southwestern Bell Telephone Company)	
)	
Revisions to Tariff FCC No. 73)	Transmittal No. 2524
)	
Local Exchange Carriers' Rates)	
Terms, and Conditions for)	CC Docket No. 94-97
Expanded Interconnection Through)	Phase II
Virtual Collocation for Special)	
Access and Switched Transport)	

MCI OPPOSITION TO DIRECT CASE

I. Introduction

MCI Telecommunications Corporation ("MCI") respectfully submits its Opposition to the Direct Case filed by Southwestern Bell Telephone Company ("SWBT") on February 7, 1997 in the above-captioned proceeding. In the Supplemental Designation Order, released January 24, 1997, the Common Carrier Bureau ("Bureau") stated that it is concerned that SWBT may have an incentive to increase interconnectors' costs of providing service to their customers by replacing equipment that has "failed" in cases where it would be more efficient to repair such equipment.¹ The Bureau therefore directed SWBT to explain how it defines "failed" equipment

¹ In the Matter of Southwestern Bell Telephone Company, Revisions to Tariff FCC No. 73, Transmittal No. 2524, Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase II, DA 96-158, Supplemental Designation Order, Released January 24, 1997 ("Supplemental Designation Order").

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and the specific methodology it plans to use for determining whether equipment can be technically or economically repaired when outside the warranty period. Also, the Bureau required SWBT to state whether interconnectors should be entitled to the salvage value of interconnector designated equipment ("IDE") in the event that equipment that "fails" is retired. SWBT was also ordered to address whether its tariff should include a provision stating that it will inform interconnectors of the warranty period for IDE and the name of the manufacturer's representative if such information is requested by interconnectors to be able to plan ahead for possible out-of-warranty expenses. Finally, the Bureau required SWBT to provide cost studies and workpapers supporting the methodologies and explanations given in its Direct case.

In its Direct Case, SWBT has failed to provide compelling responses to the Bureau's inquiries, and has unlawfully filed essential cost information separately under confidential cover.

II. SWBT Fails to Justify Its Methodology for determining Whether Interconnector Designated Equipment Should Be Replaced or Repaired

SWBT has failed in its Direct Case to provide detailed information which explains and supports its methodology for determining whether IDE must be replaced or repaired. SWBT has merely stated that it follows nondiscriminatory policies based on the recommendations of its own technicians.² The Commission correctly stated in its Virtual Collocation Order that the most expensive rate element in virtual collocation offerings is likely to be for equipment dedicated to

² SWBT Direct Case at 2.

the use of interconnectors, IDE.³ Since SWBT's tariff requires virtual collocation customers to pay a nonrecurring charge to cover the full cost of IDE, while SWBT retains title to the equipment, SWBT should not be permitted to unilaterally and arbitrarily determine whether IDE must be replaced. Under such a scenario, no safeguards exist that protect virtual collocation customers from SWBT anticompetitive behavior. Before SWBT, or any incumbent local exchange carrier ("ILEC"), replaces IDE, the ILEC should consult with its virtual collocation customer that has paid for the equipment. Then, based on the customer's recommendation, SWBT should either replace or repair the IDE. This procedure will not only prevent SWBT from increasing its competitors' costs by requiring IDE replacement where it would be more efficient to repair the "failed" equipment, but it would also prevent SWBT from unnecessarily abusing warranties that it may have negotiated with manufacturers on behalf of the virtual collocation customer. Such abuse of warranties could serve to reduce the coverage of similar warranties in the future, which in turn, could lead to even higher IDE prices for interconnectors.

III. Virtual Collocation Customers Are Entitled to Salvage Value of Interconnector Designated Equipment

SWBT's Direct Case also fails to provide any compelling explanation why its virtual collocation customers that are required to pay a nonrecurring charge to cover the full cost of IDE should not be entitled to the salvage value of failed equipment. SWBT argues that the costs of

³ Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5188 (1994)("Virtual Collocation Order").

disposing of such equipment could exceed the IDE's scrap value.⁴ While this could be true in some isolated instances, the argument is irrelevant. First, SWBT offers no evidence that supports the likelihood that the cost of disposing equipment will exceed the salvage value. SWBT merely states that it has "encountered situations of this nature."⁵ SWBT offers no documentation demonstrating the likelihood or frequency of such "encounters."

Second, the interconnector has paid up-front for the entire cost of the IDE. In the case of early IDE retirement, the interconnector has paid for both the depreciated amount of the disposed asset and any IDE salvage value. Thus, the interconnector has already paid for the retired equipment and must be refunded the salvage value. SWBT has provided no compelling arguments to the contrary.

IV. Terms and Conditions of Interconnector Designated Equipment Warranties Should Be Made Available to ILEC Virtual Collocation Customers

SWBT states in its Direct Case that it is not necessary to inform interconnectors of the warranty period normally associated with particular IDE since the interconnector has presumably "shopped-out" the equipment which it has selected and since the interconnector must place an identical unit at its end of the virtual collocation arrangement.⁶ SWBT argues that the interconnector should already be familiar with the warranty offered by the manufacturer and

⁴ SWBT Direct Case at 3.

⁵ Id. at 3.

⁶ Id. at 3.

should be able to adequately plan for out-of warranty expenses.⁷ SWBT argues that if the warranty is different, it will have been the result of negotiations between SWBT and the vendor, and most likely, will be subject to confidentiality obligations required by the vendor.

First, this assumes that SWBT negotiations with vendors always reflect its interconnectors' best interest. SWBT, which has taken every opportunity to delay or prevent the development of competition, has provided no evidence which would support such an assumption. Second, if SWBT believes that it is not necessary to tariff or make publicly available the terms and conditions of IDE warranties because interconnectors already are familiar with the warranties, then SWBT should be required to, at a minimum, honor interconnectors' warranties for similar equipment. Interconnectors should only be limited by "secret" warranties if such warranties are more favorable than those obtained by the interconnector from the vendor.

V. SWBT's Request for Confidential Treatment of Essential Cost Information Is Unlawful and Unsupported

The Bureau should not permit SWBT to unlawfully file information off-the-record without justification. The Commission should not tolerate this non-compliance which SWBT continually employs to obstruct competition from emerging in local telecommunications markets. As MCI has previously pointed out, in developing tariffs for virtual collocation services, the ILECs are tariffing many rate elements that enable other providers to compete with

⁷ Id. at 3.

ILEC retail offerings. For this reason, the potential for price discrimination is apparent.⁸

The ILECs have every incentive to use their control over the local switching arena to thwart the ability of the interconnector to compete effectively. Therefore, it is essential that the ILECs provide thorough and complete cost support, on the public record, as evidence that their rates are just, reasonable, and nondiscriminatory. The Bureau should reject SWBT's request that essential components of its cost support, which is filed in their Direct Cases, be treated as confidential.

The Communications Act and the Commission's rules require a determination that the rates offered by the LECs are neither predatory nor unreasonably high.⁹ The Commission requires that the cost support material necessary to make this determination be filed on the record. In its Direct Cases, SWBT offers no justification as to why its cost support should be treated as confidential. SWBT simply request confidential treatment of their cost support. SWBT fails to provides any evidence that demonstrates that public scrutiny of its cost support for virtual collocation services will lead to competitive harm. In fact, SWBT has failed to provided any information that demonstrates that actual, effective competition in local telecommunications access markets even exists. Without such a demonstration, it would be contrary to Commission

⁸The Commission has already correctly determined that "the great disparity in loadings primarily reflected market conditions; most LECs tended to assign low overheads in markets where they faced actual or potential competition from interconnection, and high overheads where they did not. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Order Designating Issues for Investigation, 10 FCC Rcd 3927 (Com. Car. Bur. 1995) (Phase I Designation Order).

⁹See 47 U.S.C. Section 201(b). See also and 47 C.F.R. Section 61.49(g)(2) and Section 61.49(h)(1).

precedent and the Commission's own threshold requirements for determining whether to treat data as confidential to grant SWBT's request for confidential treatment of cost information filed in support its Direct Cases.¹⁰

The public interest will best be served by continuing to allow all interested parties to participate fully, without restriction, in the ongoing expanded interconnection proceedings. Many potential entrants have specific expertise that can be extended to the Commission in their effort to assess the lawfulness of the LECs' virtual interconnection rates. These potential entrants are willing to offer their insight, in a timely manner, because it is in their interest to have the interconnection rates reflect just and reasonable costs. Without such rates, alternative providers will not be able to compete with the entrenched monopolies, and the public will not be extended the benefits of competition in the local telecommunications markets.

Restricting input into the analysis of rates, by allowing essential information to be withheld from interested parties, would jeopardize much of what the Commission has already

¹⁰ See In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal Nos. 2470, 2489, CC Docket No. 95-158 Order Initiating Investigation (Com. Car. Bur., released October 13, 1995) (DA 95-2156) ("Investigation Order"). The Bureau pointed out that, commercial or financial information filed pursuant to mandatory requirements may be deemed confidential under Exemption 4 of the Freedom of Information Act only if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. Investigation Order at ¶6. National Parks and Conservation Ass'n v. Morton, 498 F. 2d 765, 770 (D.C.) Cir. 1974); Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1579 (1993). Parties requesting such confidentiality are required to show, "by a preponderance of evidence," 47 C.F.R. §0.459(d), actual competition and a likelihood of substantial competitive injury. CNA Fin. Corp. v Donovan, 830 F.2d 1132, 1152(D.C. Cir. 1987), cert. denied sub nom., CNA Fin. Corp v McLaughlin, 485 U.S. 977 (1988). In this Order, the Bureau confirmed its policy that vague references and generalized concerns fail to meet the threshold requirements for withholding the cost data filed in support of a Transmittal.

accomplished in the expanded interconnection proceeding, as these rates are fundamental to the development of competition. The ILECs have already shown that they intend to charge excessive prices for essential bottleneck facilities. For example, SWBT continues to propose virtual collocation rates which are double that of Ameritech, CBT, Sprint, and US West, combined. The Commission should not permit SWBT -- or any other LEC -- to evade public scrutiny of its cost support.

Moreover, tariff cost support data, because it is so crucial to the review of a tariff, is precisely the type of material that the Commission has ordered to be disclosed in the past, even when it is confidential. As the Commission explained in the SCIS Disclosure Order:¹¹

Cost support materials filed with tariffs are routinely available for public inspection under the Commission's Rules, and the Commission has departed from this practice only with great reluctance. The few departures from routine disclosure have tended more toward effecting disclosure, under safeguards for proprietary material, than toward the categorical denial of public access. This practice comports with both the Administrative Procedure Act's fundamental interest in administrative decisions reached upon a public record, and the strong statutory preference for disclosure established by the FOIA.¹²

In one of the orders cited as authority for the quoted language, the 1989 TRP Confidentiality Order,¹³ the Bureau observed that "suppression of these [TRP] data would prevent other parties

¹¹Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 1526 (Common Carrier Bureau 1992), review denied, 9 FCC Rcd 180 (1993) (SCIS Disclosure Review Order), pet. for recon. pending (filed January 14, 1994).

¹²Id. at 1532, ¶ 30.

¹³Annual 1989 Access Tariff Filings: Petitions for Waiver Regarding Proprietary Treatment of Information Contained in the 1989 Tariff Review Plan, 3 FCC Rcd 7200 (Common Carrier Bureau 1988).

from commenting on the proposed rates, thus depriving the Bureau of a valuable resource in our review of the annual filings."¹⁴ Accordingly, even confidential TRP data should not be "withheld from persons who may wish to file petitions to reject, investigate, or suspend a tariff. Persons who pay tariff rates have a compelling interest in obtaining access to data that are relevant to the rate computations."¹⁵

The "legal authority" for discretionary disclosure of trade secrets is found in Sections 0.457(d) and 0.461(f) of the Commission's Rules. Section 0.457(d)(2)(i), for example, states, in part, that "a persuasive showing as to the reasons for inspection will be required" in requests under Section 0.461 for disclosure of "trade secrets or commercial, financial or technical data which would customarily be guarded from competitors," and Section 0.461(f)(4) states that such requests may be "granted." (Emphasis added). The Commission has accordingly held that disclosure of material covered by the Trade Secrets Act, 18 U.S.C. § 1905, is therefore "authorized by law."¹⁶

SWBT has not demonstrated, nor even attempted to demonstrate, that the pricing data involved warrants confidential treatment. MCI requests that the cost support be made public

¹⁴Id. at 7202, ¶ 18.

¹⁵Id. at 7202, ¶ 22. Compare, PanAmerican Satellite, FOIA Control No. 88-174, 4 FCC Rcd 4586, 4587 at ¶ 11 (1989) (contrasting document as to which discretionary release was denied with the "type of cost support data that would be required to be submitted in tariff proceedings").

¹⁶MTS & WATS Market Structure, CC Docket No. 78-72, Phase I, 4 FCC Rcd 6527, 6529 n.14 (1989) (citing Northern Television, Inc. v. FCC, C.A. No. 79-3468 (D.D.C. April 18, 1980)); American Satellite Co., FOIA Control No. 84-117, FCC 85-311 (released June 19, 1985), at ¶ 23.

immediately, to permit interested parties to participate fully in this investigation, as well as to evaluate the need for reconsideration of any Commission order resulting from the five-month suspension.

VI. Conclusion

For the above-stated reasons, the Bureau should require SWBT to (1) end its unilateral and arbitrary methodology for determining whether IDE should be replaced or repaired; (2) refund the salvage value of IDE to its virtual collocation customers; (3) make public the terms and conditions of IDE warranties; and (4) require SWBT to file all information in support of its Direct Case on the public record.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION

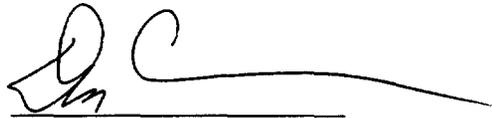
A handwritten signature in black ink, appearing to read 'Don Sussman', with a long horizontal flourish extending to the right.

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February 14, 1997

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on February 14, 1997.

A handwritten signature in black ink, appearing to be 'Don Sussman', written over a horizontal line.

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I, Lonzena Rogers, hereby certify that copies of the foregoing Opposition were sent via first class mail, postage paid, to the following on this 14th day of February, 1997.

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